

No. SC95909

In the
Supreme Court of Missouri

DANIEL K McKAY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of St. Charles County
11TH Judicial Circuit
The Honorable Nancy L. Schneider, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**JOSHUA D. HAWLEY
Attorney General**

**DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF FACTS 4

ARGUMENT 9

 A. Facts..... 9

 B. Standard of review 12

 C. Appellant’s postconviction motion was successive 12

 D. A second postconviction motion was not authorized by a second direct
 appeal. 15

CERTIFICATE OF COMPLIANCE..... 19

TABLE OF AUTHORITIES

Cases

Bain v. State, 59 S.W.3d 625 (Mo. App. E.D. 2001)..... 14, 15

Fisher v. State, 398 S.W.3d 909 (Mo. App. E.D. 2013) 13

Kniest v. State, 133 S.W.3d 70 (Mo. App. E.D. 2003) 14

Miller v. State, 408 S.W.3d 333 (Mo.App.E.D. 2013) 13

State v. Hotze, 250 S.W.3d 745 (Mo.App.E.D. 2008) 16

State v. McAfee, 462 S.W.3d 818 (Mo. App. E.D. 2015)..... 17

State v. McKay, 411 S.W.3d 295 (Mo. App. E.D. 2013) .. 5, 6, 7, 8, 9, 10, 11, 12, 14, 16

State v. Nesbitt, 455 S.W.3d 79(Mo. App. E.D. 2014)..... 17

State v. Smiley, 478 S.W.3d 411 (Mo. banc 2016)..... 17

Turpin v. State, 223 S.W.3d 175 (Mo. App. W.D. 2007) 13

Zeigenbein v. State, 364 S.W.3d 802 (Mo. App. S.D. 2012) 13

Statutes

Section 217.460, RSMo Cum. Supp 2012..... 6, 10, 11

Rules

Rule 24.035..... 14

Rule 29.15 5, 13, 16, 17

Rule 29.15(a) 13

Rule 29.15(k)..... 13

Rule 29.15(l)..... 13

Rule 30.25(b) 12

STATEMENT OF FACTS

This is an appeal from a St. Charles County Circuit Court judgment dismissing Daniel McKay's (Defendant's) pro se Rule 29.15 motion as a successive postconviction motion.

In the underlying criminal case, Defendant was convicted following a jury trial in the Circuit Court of St. Charles County of one count of unlawful possession of a firearm and two counts of selling heroin. *See State v. McKay*, 411 S.W.3d 295 (Mo. App. E.D. 2013). The Court of Appeals' opinion in Defendant's direct appeal described the facts in the underlying criminal case as follows:

In May 2010, a confidential informant (CI) informed Detective Eric Feagans (Det. Feagans) that Appellant was selling heroin. The CI set up a May 25, 2010, heroin buy between Appellant and Det. Feagans in the parking lot of Gingham's Restaurant. The buy went as planned and Det. Feagans purchased a gram and a half of heroin from Appellant for \$300.00. The CI set up another buy for May 26, 2010, on which Det. Feagans met Appellant in the Taco Bell parking lot and purchased two grams of heroin from him for \$400.00. Appellant was then stopped after leaving the scene of this transaction, arrested, and on May 27, 2010, charged by complaint filed by the St. Charles prosecuting attorney with two counts of sale of a controlled substance and unlawful possession of

a firearm, as he was a convicted felon and a loaded pistol was found in his car incident to arrest. Appellant was on probation in Pike County at the time for second-degree trafficking of narcotics.

Id. at 297.

Defendant was sentenced to twenty years in prison on each of the controlled substance counts and seven years in prison on the firearms count, with the sentences ordered to run concurrently with each other and with a prior fifteen-year sentence Defendant was serving for the narcotics-trafficking conviction in Pike County (Tr. 10). *Id.* at 299.

On direct appeal, the Court of Appeals affirmed the conviction and sentence, but ordered a limited remand of the case to the trial court for an evidentiary hearing to determine whether Defendant's constitutional right to a speedy trial was violated when he was brought to trial more than 180 days after an alleged January 20, 2011 request for disposition of a detainer under the Uniform Mandatory Disposition of Detainers Law (UMDDL). *Id.* at 306. See Section 217.460, RSMo Cum. Supp 2012. The Court of Appeals held that there was presumptive prejudice created by the delay in bringing Defendant to trial that could be rebutted by the state on remand. *Id.* at 303.

The trial court then held an evidentiary hearing during which both Defendant and the trial prosecutor testified (2nd Tr. 1-30).¹ The trial court also took judicial notice of its files and admitted several exhibits, as well as a stipulation to facts contained within the previous appellate opinion (2nd Tr. 3, 17-18, 20-21, 30). On January 31, 2014, the court issued an order, finding that Defendant's right to a speedy trial was not violated (2nd L.F. 12).

Less than a week later, on February 5, 2014, Defendant filed a pro se motion for postconviction relief. *McKay v. State*, ED103847 (1st PCR L.F. 1, 5-15).² On February 7, 2014, the motion court appointed the Public Defender's Office to represent appellant (1st PCR L.F. 12). On March 14, 2014, Defendant's appointed counsel filed an amended postconviction motion

¹ The abbreviations "2nd Tr." and "2nd L.F." refer to the transcript and legal file in Case No. ED101042, which was the direct appeal following the limited remand ordered in Defendant's first direct appeal. The record in Case No. ED101042 was transferred to this current appeal by the Court of Appeals.

² The abbreviation "1st PCR L.F." refers to the legal file from Defendant's first postconviction appeal in Case No. ED103847, which was not made a part of the record on appeal in this case, but is available on Case.net.

(1st PCR L.F. 12). On August 28, 2015, the motion court denied Defendant's amended motion without an evidentiary hearing (1st PCR L.F. 12).³

On February 6, 2014, the day after Defendant had filed his first pro se motion for postconviction relief, Defendant filed a notice of appeal from the trial court's ruling on the speedy-trial issue following the remand ordered as part of his initial direct appeal. (2nd L.F. 49–51). On April 7, 2015, the Court of Appeals affirmed the trial court's ruling. *See State v. McKay*, 460 S.W.3d 480 (Mo. App. E.D. 2015). According to Case.net in Case No. ED101042, the Court of Appeals issued its mandate on May 5, 2015.

On May 26, 2015, Defendant filed a second pro se motion for postconviction relief (2nd PCR L.F. 4-9). On June 1, 2015, the motion court appointed the Public Defender's Office to represent an appellant (2nd PCR L.F. 10). On June 16, 2015, postconviction counsel entered appearance and requested an extension of thirty days to file an amended motion (2nd PCR L.F. 1). On June 18, 2015, the motion court granted the extension (2nd PCR L.F. 1-2). On August 28, 2015, before the amended motion was due, the

³ On August 23, 2016, the Court of Appeals affirmed the motion court's findings of fact and conclusions of law. *See McKay v. State*, ED103847 (Mo. App. E.D. Aug. 23, 2016).

motion court issued an order dismissing the postconviction motion as successive (2nd PCR L.F. 2, 11).

On June 28, 2016, the Court of Appeals issued an opinion, holding that Defendant's second postconviction motion challenging the same conviction and sentence was not successive. *See McKay v. State*, Case No. ED103549 (Mo. App. E.D. June 28, 2016). On November 1, 2016, this Court sustained respondent's application for transfer.

ARGUMENT

The motion court did not clearly err in dismissing Defendant's second postconviction motion because it was successive.

Defendant claims that the motion court clearly erred in dismissing his second postconviction motion as successive (App. Br. 16-25).

A. Facts.

On March 14, 2012, the jury convicted Defendant of two counts of sale of a controlled substance and one count of unlawful possession of a firearm. *State v. McKay*, 411 S.W.3d 295, 299 (Mo. App. E.D. 2013). On July 3, 2012, the court sentenced appellant to twenty years on each of the controlled substances counts and seven years on each firearm count. *Id.*

On appeal, the Court of Appeals affirmed the conviction and sentence, but remanded in part for an evidentiary hearing on the question of whether appellant's constitutional right to a speedy trial was violated when he was brought to trial more than 180 days after an alleged request for disposition of a detainer under the Uniform Mandatory Disposition of Detainers Law (UMDDL), which was allegedly filed on January 20, 2011. *Id.* at 306. *See*, Section 217.460. The Court of Appeals issued a mandate on November 14, 2013. The mandate stated:

The Court, being sufficiently advised of and having considered the premises, adjudges that the judgment entered by

the St. Charles County Circuit Court in cause No. 1011-CR02897-01 be remanded in part for the limited purpose of conducting an evidentiary hearing on whether the Defendant's constitutional speedy trial right was violated pursuant to the disposition of detainers law set in Section 217.460, and be affirmed in all other respects in accordance with this Court's opinion delivered September 10, 2013.

State v. McKay, ED98489 (Mo. App. E.D. Nov. 14, 2013).

On January 10, 2014, the trial court held an evidentiary hearing at which both appellant and the trial prosecutor testified (2nd Tr. 1-30, 2nd L.F. 12). The trial court took judicial notice of its files and admitted several exhibits, as well as a stipulation to facts contained within the previous appellate opinion (2nd Tr. 3, 17-18, 20-21, 30). On January 31, 2014, the court issued an "order and judgment," finding that appellant's right to a speedy trial was not violated (2nd L.F. 12).

On February 5, 2014, appellant filed a pro se motion for postconviction relief. *McKay v. State*, ED103847 (ED103847 L.F. 1, 5-15). On February 7, 2014, the motion court appointed the Public Defender's Office to represent appellant (ED103847 L.F. 12). On March 14, 2014, appellant filed an amended motion, raising claims of ineffective assistance of trial counsel (ED103847 L.F. 12, 16-33). On August 28, 2015, the motion court issued

findings of fact and conclusions of law, correcting an error in the judgment nunc pro tunc and denying the remainder of the motion without an evidentiary hearing (ED103847 L.F. 12).

On February 6, 2014, after appellant had filed his pro se motion for postconviction relief, appellant filed a notice of appeal, in which he appealed the trial court's "order and judgment" finding no speedy trial violation. *State v. McKay*, ED101042 (Mo.App.E.D. February 6, 2014). On April 7, 2015, the Court of Appeals affirmed the trial court's "order and judgment" pursuant to Rule 30.25(b). *State v. McKay*, 460 S.W.3d 480 (Mo.App.E.D. 2015). The Court of Appeals issued its mandate on May 5, 2015.

On May 26, 2015, appellant filed another pro se motion for postconviction relief (2nd PCR L.F. 4-9). On June 1, 2015, the motion court appointed the Public Defender's Office to represent appellant (2nd PCR L.F. 10). On June 16, 2015, postconviction counsel entered an appearance and requested an extension of thirty days to file an amended motion (2nd PCR L.F. 1). On June 18, 2015, the motion court granted the extension (2nd PCR L.F. 1-2). On August 28, 2015, before the amended motion was due, the motion court issued an order dismissing the second postconviction motion as successive (2nd PCR L.F. 2, 11).⁴

⁴ The amended motion was due on August 31, 2015.

B. Standard of review

An appellate court's review of the denial of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Rule 29.15(k). An appellate court will find error in a denial of a motion for post-conviction relief only if, after review of the entire record, the appellate court has a definite and firm belief that a mistake has been made. *Miller v. State*, 408 S.W.3d 333, 335 (Mo.App.E.D. 2013).

C. Appellant's postconviction motion was successive

Rule 29.15 provides the exclusive procedure for a movant to seek postconviction relief of "the conviction and sentence imposed." Rule 29.15(a). Rule 29.15(a); *Fisher v. State*, 398 S.W.3d 909, 912 (Mo. App. E.D. 2013). The rule further provides that the "circuit court shall not entertain successive motions." Rule 29.15(l). "A motion is successive if it follows a previous post-conviction relief motion addressing the same conviction." *Zeigenbein v. State*, 364 S.W.3d 802, 804 (Mo. App. S.D. 2012) (quoting *Turpin v. State*, 223 S.W.3d 175, 176 (Mo. App. W.D. 2007)).

Appellant challenged the same conviction in both postconviction motions under Rule 29.15. The first postconviction motion was fully litigated. The motion court issued findings of fact and conclusions of law, denying the merits of appellant's claims. This denial was affirmed on appeal. *See McKay*

v. State, Case No. ED103847 (Mo. App. E.D. Aug. 23, 2016). Because Defendant's second postconviction motion challenged the same conviction and sentence, the motion court did not clearly err in finding that it was successive.

The cases cited by appellant are inapplicable. In *Kniest v. State*, 133 S.W.3d 70 (Mo. App. E.D. 2003), the defendant filed a postconviction motion under Rule 24.035 alleging several grounds, including a claim of a sentencing error. The motion court remanded the case to the trial court for resentencing. *Id.* at 71. The defendant filed a second Rule 24.035 motion alleging ineffective assistance during the resentencing proceeding. *Id.* The motion court dismissed the second Rule 24.035 motion as successive. *Id.* But the Court of Appeals reversed the dismissal and held that the defendant's second motion was not successive because it was directed to claims related to the resentencing proceeding. *Id.* at 71-72.

Likewise, in *Bain v. State*, 59 S.W.3d 625 (Mo. App. E.D. 2001), the defendant's direct appeal was dismissed because his counsel failed to file a timely appeal. *Id.* (citing *State v. Bain*, 982 S.W.2d 706 (Mo. App. E.D. 1998)). Afterwards, the defendant filed a Rule 29.15 motion raising three claims of ineffective assistance of counsel, two of which concerned errors at trial and one of which concerned the failure to file a timely appeal. *Id.* The motion court granted relief on the ground that the defendant's prior counsel failed to

timely appeal, and, as a remedy, resentenced the defendant to enable him to file a timely notice of appeal. *Id.* But the motion court denied the defendant's remaining claims of ineffective assistance of counsel, and the Court of Appeals affirmed the motion court's ruling. *Id.* (citing *Bain v. State*, 29 S.W.3d 414 (Mo. App. E.D. 2000)). After resentencing, the defendant filed a direct appeal from his conviction, and the conviction was affirmed. *Id.* (citing *State v. Bain*, 32 S.W.3d 137 (Mo. App. E.D. 2000)). The defendant filed a second, pro se postconviction relief, alleging several of the same errors raised in his original postconviction-relief motion, which was dismissed by the motion court as "untimely filed and moot." *Id.*

The Court of Appeals held that the second postconviction motion was not successive because it involved an "unusual situation in which movant brought his first postconviction motion before his direct appeal was timely filed." *Id.* The Court held that "movant could not assert any claims of error in this first postconviction motion relative to his resentencing or his direct appeal for the simple reason that any such errors had not yet occurred." *Id.*

Unlike in *Kniest* and *Bain*, in which the defendants were resentenced and a new judgment was entered, in Defendant's there was only one judgment and sentence. Defendant has filed two postconviction motions challenging the same sentence and judgment. While the Court of Appeals remanded the case to the trial court for an evidentiary hearing, there was no

new sentence imposed after remand; thus, there was no new conviction to challenge under Rule 29.15. The criminal case became final when the conviction and sentence were imposed, and appellant second postconviction motion was successive. *See State v. Hotze*, 250 S.W.3d 745, 746 (Mo.App.E.D. 2008) (in a criminal case, the judgment becomes final when the sentence is entered). Appellant second postconviction motion was successive and it was properly dismissed by the motion court.

D. A second postconviction motion was not authorized by a second direct appeal.

Defendant contends that he was entitled to file a second postconviction motion because the Court of Appeals reviewed his second direct appeal following the remand for an evidentiary hearing. (Deft. Br. 20-21). He further asserts that he was entitled to challenge trial counsel's effectiveness at the evidentiary hearing and appellate counsel's performance in the second direct appeal (Deft. Br. 23).

Whether Defendant pursued a second direct appeal does not change the nature of his postconviction motion. While the Court of Appeals remanded the case for an evidentiary hearing after the first appeal, it did not vacate the conviction and sentence. *State v. McKay*, 411 S.W.3d at 303. On remand, the trial court found no speedy trial violation and no new judgment and sentence were entered.

Additionally, the Court of Appeals did not hold the case open for further appellate proceedings after completion of the evidentiary hearing. In a criminal case, the judgment becomes final when a sentence is entered or the trial court issues an order of dismissal prior to trial. *State v. Smiley*, 478 S.W.3d 411, 415 (Mo. banc 2016); *State v. McAfee*, 462 S.W.3d 818, 822 (Mo. App. E.D. 2015). The Court of Appeals did not provide a further avenue for challenging Defendant's conviction and sentence after the evidentiary hearing, and no second appeal was authorized after the remand. *Compare State v. Nesbitt*, 455 S.W.3d 79, 89 (Mo. App. E.D. 2014) (the Court of Appeals remanded the case for an evidentiary hearing on a motion to suppress and ordered the trial court to certify and file the transcript of the hearing for further appellate review). Because Defendant's conviction and sentence was affirmed after the first appeal, no new sentence was entered and Defendant had no right to challenge his conviction and sentence twice.

Assuming Defendant had the right to a second direct appeal, this did not give him the right to file a second postconviction motion under the language of Rule 29.15. Defendant's postconviction motion was fully litigated and he received all remedies he was entitled to under Rule 29.15. Although Defendant's second direct appeal was still pending in the Court of Appeals while he litigated his first postconviction motion, there is nothing in Rule 29.15 prohibiting the litigation of a premature motion. Because Defendant

was entitled to one collateral attack on the judgment in his underlying criminal case, and he fully litigated his first postconviction motion, the motion court did not clearly err in dismissing Defendant's second, or successive, postconviction motion challenging the same judgment and sentence. Defendant's claim should be denied.

CONCLUSION

For the foregoing reasons, the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov
ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.0, and contains 2,833 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on January 10, 2017, to:

Lisa M. Stroup
1010 Market Street
Suite 1100
St. Louis, MO 63101

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov
ATTORNEYS FOR RESPONDENT